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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 159

PACIFIC COAST WHOLESALERS ASSOCIATION,
Petitioner,

vs.

CLOVER LEAF FREIGHT LINES, INC., INTERSTATE DISPATCH, INC., JOHN W. DEVANNEY and RALPH E. KINNEAR, co-partners, doing business under the name and style of MIDDLE STATES MOTOR FREIGHT, and ROCKFORD MOTOR SERVICE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF.

SAMUEL M. KANE,
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Scheffer Printing Company, Del. 7171

TABLE OF CONTENTS

	PAGE
Petition for a writ of certiorari	1
Statement of the matters involved	2
Opinions below	5
Jurisdiction	5
Questions presented	5
Reasons relied on for allowance of writ	6
Brief in support of petition for writ of certiorari	9
I. The decision of the Circuit Court of Appeals that Petitioner was subject to service of process in Illinois conflicts with a long line of decisions of this Court	9
II. Petitioner was not validly served with summons because the person on whom the summons was served was not its officer or agent	12
III. The holding of the Circuit Court of Appeals that its decision is controlled by Commercial Casualty Insurance Co. v. Consolidated Stone Co., despite the promulgation of the Federal Rules of Civil Procedure, so that the venue privilege was waived by permitting default judgment to be entered, raises an important question of federal law which has not been, but should be, settled by this court	13

TABLE OF AUTHORITIES CITED.

CASES.

Bank of American v. Whitney Central National Bank, 261 U. S. 171 ..... 6, 10

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333 ..... 6, 7, 10, 13

PAGE

Commercial Casualty Insurance Co. v. Consolidated Stone Co., 278 U. S. 177, 180, 181 .....5, 6, 7, 14
Consolidated Textile Corp. v. Gregory, 289 U. S. 85 ....6, 10
International Shoe Co. v. Washington, 326 U. S. 310 ....4, 10
Lafayette Insurance Co. v. French, 18 How. 404 .....6, 10
Peterson v. Chicago, Rock Island & Pacific Ry. Co., 205 U. S. 364 .....7, 12

STATUTES.

Illinois Civil Practice Act, sec. 17; Ill. Rev. Stat. 1947, Ch. 110, sec. 141 12
Judicial Code, sec. 24 (8); 28 U.S.C.A. sec. 41 (8) 9
Judicial Code, sec. 51; 28 U.S.C.A. sec. 112 13
Judicial Code, sec. 240; 28 U.S.C.A. sec. 347 5
17 Stat. 197; 28 U.S.C.A. sec. 724 14

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 4 (d) (3) 12
Rule 4 (d) (7) 12
Rule 12 (b) 14, 15
Rule 60 (b) 15

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Pacific Coast Wholesalers Association, a corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment entered by that court on January 14, 1948, reversing the judgment of the District Court setting aside default judgments against petitioner, quashing the Marshal's return of service of summons and dismissing the suit (R. 39).

Statement of the Matters Involved

This case involves the questions of venue and jurisdiction over a foreign corporation in a suit brought in a District Court of the United States to collect freight charges.

Respondents, four carriers engaged in interstate transportation of freight by motor vehicle, brought suit in the District Court of the United States for the Northern District of Illinois against petitioner seeking judgments for freight charges claimed to have been underpaid. Petitioner is a California non-profit corporation whose members comprise a number of industrial firms located on the west coast. Its principal office is in California. It has not applied for a license to do business in Illinois or appointed an agent there for service of process (R. 25). Its members issue instructions to their eastern and mid-western suppliers to consign less than carload shipments to petitioner in care of Transport Terminal Company at Chicago, Illinois (R. 26).

Transport Terminal is an Illinois corporation engaged in the business of consolidating, distributing, and forwarding freight for various shippers. It has a contract with petitioner, as well as with a number of other shippers, whereby it agrees to receive at its terminal in Chicago, freight arriving from various points consigned to petitioner or its members, to consolidate the shipments into carloads and to forward them to petitioner on the west coast. Transport Terminal charges petitioner a certain number of cents per hundred pounds for all freight handled. Less than one-half its volume of business is done with petitioner. It maintains its own offices in Chicago, pays all its own expenses, hires and directs its own employees and, through its officers and directors, has the sole direction and control of its business, including the method and means by which its contract with petitioner

is performed. It receives no money or compensation from petitioner other than the above charge for its services. There is no common ownership of the stock of the two corporations or any organizational connection between them, except that the manager of petitioner is also vice-president of Transport Terminal (R. 36-38).

Transport Terminal investigates, checks, revises and advances the freight charges for the shipments received and determines the charges to be paid by petitioner's members for its services. Petitioner's name appears in the Chicago telephone directories and on a sign over Transport Terminal's receiving dock (R. 27).

The summons was served on June 3, 1946, upon the president of Transport Terminal, Al Davis, the Marshal describing him as an agent of petitioner (R. 11). Petitioner having failed to appear within twenty days thereafter, default judgments aggregating approximately $7,000.00, were entered on July 1, 1946 (R. 15-17). Petitioner, on August 6, 1946, moved to vacate the judgments and dismiss the suit on the ground that the venue was improper and supported its motion by an affidavit showing that petitioner was a California corporation, that it was not licensed to do business in Illinois, that it had no agent there for the purpose of accepting service of process, and that it had not consented to be sued there (R. 24-25).

While this motion was pending, petitioner, by leave of court, amended it to object also to the jurisdiction over its person on the grounds that it was not subject to service of process in Illinois because it was not doing business there, and that Al Davis, upon whom the summons had been served, was not its officer, agent or employee (R. 33-35). Supporting affidavits were filed (R. 35-39).

The District Court sustained the motion as amended, vacated the judgments, quashed the return of service and dismissed the suit (R. 39). On appeal the Circuit Court of Appeals reversed this judgment (R. 48-59).

The Circuit Court of Appeals, on the question of jurisdiction, rested its decision on the opinion of this Court in *International Shoe Co.* v. *Washington,* 326 U. S. 310. To do so it went outside the record to make an erroneous assumption of a fact which it seemed to consider highly important. It assumed that this suit arose because Transport Terminal had reduced the amount of the freight charges demanded by respondents (R. 56), and reasoned that since those acts gave rise to the suit and occurred in Illinois the maintenance of the suit there did not offend "traditional notions of fair play and substantial justice." The fact is, however, as pointed out by petitioner in its petition for rehearing in the Circuit Court of Appeals (R. 63-64), that, except for occasional mathematical corrections, Transport Terminal did not reduce any freight bills but paid them as submitted by respondents, and that this lawsuit arises because respondents now claim they should have charged petitioner rates higher than those originally charged.

As to the validity of the service of summons on the president of Transport Terminal, who was not an officer, agent or employee of petitioner, the Circuit Court of Appeals, having concluded that petitioner was subject to service of process in Illinois because of the activities there of Transport Terminal, held that service on its president satisfied the requirements of the Federal Rules of Civil Procedure that service be made on an officer or agent of the defendant (R. 56-57).

With respect to the question of venue, the Circuit Court of Appeals, although agreeing with petitioner that the

venue was improper, nevertheless held that under the decision of this Court in *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177, petitioner had waived the venue privilege by permitting default judgments to be entered (R. 59). The Court overruled petitioner's contention that this decision is outdated by, and inconsistent with, the Federal Rules of Civil Procedure and should therefore no longer be controlling.

Opinions Below

The opinion of the Circuit Court of Appeals appears in the Record at pages 48-59, and is reported in 166 F. 2d 626.

The District Court rendered an unreported oral decision.

Jurisdiction

The jurisdiction of this Court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C.A. sec. 347.

The judgment of the Circuit Court of Appeals was entered January 14, 1948 (R. 60). A petition for rehearing was filed January 29, 1948 (R. 61), and was denied April 19, 1948 (R. 73).

Questions Presented

1. May a foreign corporation engaged in the business of consolidating freight for its members be served with summons in a state where it is not licensed to do business and has no officers or employees but has a contract with an independent local corporation, similar to contracts which the latter has with others, under which the local corporation accepts freight consigned to the foreign corporation, reloads it into freight cars and re-consigns it to the foreign corporation, and performs incidental serv-

ices such as checking, revising and advancing the freight charges, the name of the foreign corporation appearing on a sign at the local corporation's receiving dock and in the local telephone directories?

2. If such a foreign corporation is subject to service of summons in the local state may the summons be served upon an officer of the local corporation who is not an officer, agent or employee of the foreign corporation?

3. May a Circuit Court of Appeals erroneously assume facts outside the record which assumed facts appear to be highly important to its decision whereby the judgment of the District Court is reversed?

4. Does the rule laid down in *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177 (1929) that the venue privilege is waived by permitting default judgment to be entered, still obtain, despite the promulgation of the Federal Rules of Civil Procedure?

Reasons Relied on for Allowance of the Writ

The exercise of the discretionary power of this Court to grant the writ of certiorari is requested for the following reasons:

1. The decision of the Circuit Court of Appeals, that petitioner is subject to service of process in Illinois, is in conflict with a long line of decisions of this Court beginning with *Lafayette Insurance Co.* v. *French*, 18 How. 404 (1856) and continuing through *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85 (1933), and particularly with the decisions in *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171 (1923) and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925).

2. The decision of the Circuit Court of Appeals, that service of summons could be effected on petitioner by

serving the president of a local corporation who was neither officer, employee nor agent of petitioner, is in direct conflict with the decisions of this Court in *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364 (1907) and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925), as well as with the Rules of Civil Procedure.

3. By departing from the record to erroneously assume that Transport Terminal had reduced the freight bills submitted and that such reductions gave rise to this suit, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

4. The decision of the Circuit Court of Appeals, that the rule laid down in *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177 (1929), is still controlling despite the promulgation of the Federal Rules of Civil Procedure, so that the venue privilege is waived by permitting default judgment to be entered, raises an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in this cause.

PACIFIC COAST WHOLESALERS ASSOCIATION,
a corporation,

By: SAMUEL M. KANE,
MEYER J. MYER,
DAVID J. SHIPMAN,
Counsel for Petitioner.

.....

Chicago, Illinois,
July 14, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

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vs.

CLOVER LEAF FREIGHT LINES, INC., INTERSTATE DISPATCH, INC., JOHN W. DEVANNEY and RALPH E. KINNEAR, co-partners, doing business under the name and style of MIDDLE STATES MOTOR FREIGHT, and ROCKFORD MOTOR SERVICE, INC.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I.

The Decision of the Circuit Court of Appeals that Petitioner Was Subject to Service of Process in Illinois Conflicts with a Long Line of Decisions of This Court.

This suit was instituted in a federal district court for the collection of alleged freight undercharges. The jurisdiction over the subject matter is founded by the complaint upon sec. 24 (8) of the Judicial Code, 28 U.S.C.A. sec. 41 (8) R.

3), which confers original jurisdiction on the district courts of the United States in suits arising under any law regulating commerce. There is no special statutory provision prescribing where summons shall be served in such an action. The question therefore presented is whether, under the decisions of this Court, the petitioner was subject to service of process in Illinois, or in other words, as it has sometimes been put, was the defendant "found", "present" or "doing business" in Illinois.

While it is undoubtedly true that each case in which this question arises must necessarily turn on its own facts, there would be little doubt, were it not for the opinion in *International Shoe Company* v. *Washington,* 326 U. S. 310 (1945), that the instant case is one in which the petitioner would be held not to be doing business in Illinois. *Bank of America* v. *Whitney Central National Bank,* 261 U. S. 171 (1923); *Cannon Mfg. Co.* v. *Cudahy Packing Co.,* 267 U. S. 333 (1925); and the unbroken line of decisions from *Lafayette Insurance Co.* v. *French,* 18 How. 404 (1856), to *Consolidated Textile Corp.* v. *Gregory,* 289 U. S. 85 (1933).

But the Circuit Court of Appeals felt that the *International Shoe* case required it to hold otherwise. In this, we submit, they were in error. The nub of that case, it seems to us, was that the State of Washington was attempting to enforce collection of unemployment contributions on the salaries paid to salesmen employed by the defendant in that state. We would readily agree that it would offend against traditional notions of justice and fair play to require the State of Washington to go elsewhere to enforce its rights. The instant case, however, is different. It is a private suit for the collection of alleged freight undercharges on shipments which moved from points in the east to Chicago. Two of the four plaintiffs are themselves

corporations foreign to Illinois (R. 2, 5, 6, 8). Petitioner has never had any employees in Illinois. Its sole contact with that state is a contract with a local corporation whereby the latter receives freight shipments consigned to it, consolidates them into freight cars and sends them on to petitioner on the west coast. The local corporation has similar arrangements with five other western concerns and is completely independent of the petitioner. It solicits and is ready to perform this same service for the general public. The only organizational connection between petitioner and the local corporation is that petitioner's manager is also vice-president of the latter (R. 37-38).

By erroneously assuming facts not in the record, the Circuit Court of Appeals thought that this case came within the orbit of the *International Shoe* case. It assumed that Transport Terminal reduced the freight bills submitted by respondents and that this suit resulted from such reductions (R. 56). Nowhere does this appear in the record. As petitioner pointed out in its petition for rehearing, the Circuit Court of Appeals apparently construed the word "revised" in Conlon's affidavit (R. 27) to mean "reduced", and then further assumed that this gave rise to this lawsuit. The fact is, however, that except for occasional mathematical corrections, no bills were reduced; and this suit arose because respondents concluded that they should have charged petitioner rates higher than those originally billed. See Petition for Rehearing (R. 63-64) and affidavit attached thereto (R. 66-67).

It would be futile to deny that the concept of what activities of a corporation will subject it to service of process in another state has undergone considerable extension since its first pronouncement. But it has not been extended to the point where a corporation which merely has a con-

tract with a local corporation such as is here involved thereby becomes subject to service of process in the local state. Nor do we believe that orderly judicial administration in a federated government demands that result. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and should be reviewed.

II.

Petitioner Was Not Validly Served with Summons because the Person on Whom the Summons Was Served Was Not Its Officer or Agent.

The Marshal's return of the summons reads:

> "Served this writ together with copy of Complaint on the within named Pacific Coast Wholesalers Association, a corporation, by delivering copies thereof to Al Davis, an agent of said corporation, this 3rd day of June, A. D. 1946. The President of said corporation not found in my district." (R. 11.)

Al Davis was the president of Transport Terminal and was not an officer, agent or employee of petitioner (R. 38).

According to the Federal Rules of Civil Procedure, Rule 4 (d) subsections 3 and 7, and reading into them section 17 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1947, Ch. 110, sec. 141) as they require, it is uncontroverted that a domestic or foreign corporation may be served with summons only by delivering the summons to an officer or agent of the corporation.

The Circuit Court of Appeals in upholding the validity of the service said that since Transport Terminal was petitioner's agent, it followed that service upon Transport Terminal's president was service upon petitioner (R. 57). This holding is contrary to the decisions of this Court in *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205

U. S. 364 (1907) and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925). In those cases, it was held that service upon an officer of the local corporation (*Peterson* case) or upon an agent of the local corporation (*Cannon* case) is not good service upon the foreign corporation.

Even if the Circuit Court of Appeals were correct in holding that Transport Terminal was petitioner's agent for the purpose of ascertaining whether petitioner was doing business in Illinois, it would not follow that Transport Terminal's officers and agents thereby became petitioner's agents for the purpose of service of process. To equate one to the other violates long established and accepted concepts of the nature and incidence of the relationship of principal and agent. In doing so the Circuit Court of Appeals was in error. The order of the District Court setting aside the Marshal's return of service was correct.

III.

The Holding of the Circuit Court of Appeals That Its Decision is Controlled by Commercial Casualty Insurance Co. v. Consolidated Stone Co., Despite the Promulgation of the Federal Rules of Civil Procedure, so That the Venue Privilege Was Waived by Permitting Default Judgment to Be Entered, Raises an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The venue in this case is fixed by section 51 of the Judicial Code, 28 U.S.C.A. sec. 112, the district of which petitioner is an inhabitant. The Circuit Court of Appeals conceded that since petitioner was not an Illinois corporation and had not designated an agent there for service of process it was not an inhabitant of that state and that the venue was therefore improperly laid there (R. 57). It concluded, however, that petitioner had

waived its venue privilege by suffering default judgments to be entered against it. This conclusion was based on the supposed controlling effect of *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177 (1929). Whether that decision is controlling since the promulgation of the Federal Rules of Civil Procedure is an important question which this Court should settle.

The *Commercial Casualty* case was an action at law brought in a federal District Court in Ohio on grounds of diversity of citizenship. This Court held, in response to a question certified to it, that defendant had waived its venue privilege by permitting a default judgment to be entered. But that case was decided in 1929 before the Federal Rules of Civil Procedure had been promulgated. The waiver there was spelled out of the requirements of Ohio state court procedure which, under the Conformity Acts (17 Stat. 197, 28 U.S.C.A. sec. 724), determined the procedure in the District Court. The Court said:

> "The Ohio practice statute prescribes that all objections thus appearing when so neglected shall be deemed to have been waived * * *." (p. 180.)
>
> * * * * *
>
> "Our conclusion is that the objection was not seasonably made and therefore that under our decisions, as also the Ohio statute, it was waived." (p. 181.)

With the issuance of the new rules a simplified, direct and liberalized system of procedure was provided in the Federal courts. Formal distinctions between various types of pleas were largely abolished. By Rule 12 (b) it was provided that all defenses, including venue, may, if desired, be pleaded at the same time. Thus, objection to the venue may be raised simultaneously with, and in the same responsive pleading as, a defense to the merits. Both stand on

the same footing with respect to the time when they may or should be asserted. Failure to assert the one at the proper time is no more or less a waiver than failure to assert the other.

Rule 60 (b) permits the court to vacate judgments taken against a defendant through his mistake, inadvertence, surprise or excusable neglect, provided the motion is made within a reasonable time. The meaning and design of these two rules seems to be that a court may exercise its discretion to vacate a default judgment within the proper time under Rule 60 (b) and upon so doing the defendant is entitled to interpose any of the defenses permitted under Rule 12 (b) in his first responsive pleading. This includes the defense of improper venue. With such meaning and design the holding in the *Commercial Casualty* case is inconsistent. It should therefore no longer be considered as controlling and the decision of the Circuit Court of Appeals to the contrary should be reviewed.

Respectfully submitted,

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